Supreme Court, U.S.
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In The
Supreme Court of the United States

ERIC GRILLOT

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

Petition for Writ of Certiorari To The
Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

LYNN D. LISK.
415 N. McKinley #150
Little Rock, AR 72205
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Petitioner's Counsel
of Record

July 30, 2003

132 pp

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QUESTIONS PRESENTED

I. Arkansas violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U. S. Constitution when it grants the prosecution's request for a jury instruction on a lesser included offense when the criminal defendant is barred from requesting it and objects to it.

II. Arkansas is in violation of Fifth Amendment of the U.S. Constitution and *Miranda vs. Arizona*, 384 U.S. 436 (1966) in its ruling that the Petitioner's confession was not to be suppressed when, during the course of the confession, the police specifically stated to the Petitioner that his confession would not be used in court.

PARTIES TO THE ACTION

All the parties to this case are listed in the caption.

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TABLE OF AUTHORITIES

CASES:

Beck v. Alabama, 447 U.S. 625 (1980)

Britt v. State, 344 Ark. 13, 38 S.W.3d 363 (2001)

Commonwealth v. Woodward, 427 Mass. 659, 694 N.E.2nd 1277 (1998)

Commonwealth v. Gould, 413 Mass. 707 __ N.E.2nd __(1992)

Commonwealth v. Thayer, 418 Mass. 130, __ N.E. 2nd__ (1994)

Doby v. State, 290 Ark. 408, 720 S.W.2d 694 (1986)

Hopkins v. Reeves, 524 U.S. 88 (1998)

Nichols v. State, 62 Ark. App. 212, 11 S.W.3d 451 (2000)

Schmuck v. U.S., 489 U.S. 705 (1989)

State v. Jones, 321 Ark. 451, 903 S.W.2d 170 (1995).

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, U.S. Const.
Sixth Amendment, U.S. Const.
Fourteenth Amendment, U.S. Const.

STATUTES AND RULES:

28 U.S.C. § 1257(a)

Ark. Code Ann. § 5-1-110(c)

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Petitioner, Eric Grillot, respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Appendix A) is reported at ____ Ark. ____, ____S.W.3d _____(Ark.CR01-792, 5-22-2003).

JURISDICTION

The Arkansas Supreme Court decided the appeal in this case on May 22, 2003. (App. A, *infra*). A petition for re-hearing was not sought and this petition is brought within ninety (90) days of the entry of mandate in the case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides as follows:

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the U.S. Constitution provides as follows:

In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . .

The Fourteenth Amendment to the U.S. Constitution, § 1, provides in pertinent part as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty o9r property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Eric Grillot was convicted on August 25, 2000, after a three day jury trial, of First Degree Murder, Hindering Apprehension, Aggravated Robbery and Theft of Property. Over the objection of the Petitioner, the First Degree Murder charge was presented to the jury as a lesser included offense on the charge of Capital Murder. The Petitioner was sentenced to serve a term of twenty (20) years in the Arkansas Department of Corrections. These convictions and the sentence was affirmed by the opinion of the Arkansas Supreme Court on May 22, 2003. In this Petition for Writ of Certiorari the Petitioner challenges only the constitutionality of the giving of the First Degree Murder instruction to the jury over his objection and the refusal to suppress his confession prior to the trial.

To summarize the facts of the case, on February 14, 1998, the Petitioner, and his two roommates, Jeremy Phillips and Will Jackson, using Will Jackson's truck, left Alabama where they shared a trailer and drove all night to Arkansas. Jeremy Phillips and the Petitioner were originally from Arkansas and supposedly Jeremy Phillips had decided to move back to Arkansas and the Petitioner was coming along for the ride and to visit his family in the area. Allegedly there was an arrangement whereby Jeremy Phillips would obtain a quantity of marijuana for use in paying Will Jackson for the use of his truck in the move. Upon arriving in Fairfield Bay, Arkansas, some visits with family members took place and Jeremy Phillips supposedly made a phone call to set up the delivery of the marijuana. The three then drove to a secluded spot where they were allegedly to wait for the marijuana to be

delivered.

At this time, being tired from the all night drive, the Petitioner claims he fell asleep in the truck while sitting behind the steering wheel and was awakened by a loud "bang." The noise was actually the sound of Jeremy Phillips, who was in the back seat of the truck, shooting Will Jackson (who was sitting in the front passenger seat) in the back of the head with a .44 caliber pistol. Will Jackson died instantly from the gunshot wound.

The Petitioner then assisted Jeremy Phillips in concealing the body of Will Jackson in the woods and cleaning the blood out of the vehicle. The Petitioner then dropped Jeremy Phillips off at his home in Arkansas and drove Will Jackson's truck back to Alabama where he abandoned it and threw the keys into a body of water.

Shortly thereafter, the victim's father reported Will Jackson as a missing person to the Alabama authorities and an investigation as to his whereabouts was begun in Alabama. The Petitioner was interviewed and told the police in Alabama that he and Will Jackson had returned from Arkansas together and that the day after their return he had gone to work leaving the victim in their shared residence and that he did not know where he was or what had happened to him, but that Will Jackson had mentioned something about a job in Florida. The Petitioner repeated this story to the victim's father on several occasions as well.

Soon after this, the Petitioner himself decided to move back to his former home in Fairfield Bay, Arkansas. Shortly after his arrival there he and Jeremy Phillips were called in for questioning by police in Fairfield Bay who had been

asked to follow up on the Alabama missing person investigation. The Petitioner and Jeremy Phillips basically repeated the same story that the Petitioner had already told in Alabama and they were released. A few days later, Will Jackson's body was discovered and the police were sent to bring in the Petitioner and Jeremy Phillips for further questioning since the police now knew the story of the return trip to Alabama with the Petitioner had been false. It was during this interrogation that the Petitioner told the truth about what had taken place and Jeremy Phillips confessed to the actual murder.

Initially, the Petitioner was charged with Hindering Apprehension based on his complicity in covering up the murder after the fact, but he was not charged with the murder itself as he had no knowledge or complicity in it according to both himself and Jeremy Phillips. However, After Jeremy Phillips was convicted of the murder, he contacted the police and gave them a second statement from prison in which he claimed that the Petitioner had been directly involved in the killing of Will Jackson and that it was a murder-for-hire scheme (Appendix D1-2). Based on this second statement, in February 2000, the state of Arkansas amended the charges against the Petitioner to include a charge of Capital Murder (Appendix B17, 20-21).

A Motion to Suppress the Petitioner's confession was begun on May 10, 1999 and further evidence was taken on May 24, 1999. On August 7, 2000 the Motion to Suppress the confession was denied (Appendix B24).

At the trial the Petitioner admitted responsibility for trying to cover-up the murder and his guilt on the Hindering

Apprehension charge. However, he continued (and continues to this day) to deny that he had any prior knowledge that the murder was going to take place.

At the close of the trial the state requested the jury be instructed on the lesser included offense of First Degree Murder. However, the Petitioner objected to the jury being instructed on this as it was, for him, an "all or nothing" case. Because of his denial of any knowledge of, complicity with or involvement in the murder, under the state cases of *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986) and *Nichols v. State*, 62 Ark. App. 212, 11 S.W.3d 451 (2000),[1] there was no rational basis to give the instruction and had the Petitioner requested the instruction it would properly have been refused. However, the instruction was given based on the State's request and the Petitioner was convicted on the lesser charge.

It is still unclear as a matter of state, federal and constitutional law whether a jury instruction on a lesser included offense is properly submitted to a jury when the Defendant himself objects to the giving of the instruction. Particularly when the Defendant himself would be barred from requesting the instruction due to his complete denial of any involvement in any offense and hence a lack of a rational basis for his request since such a request is inconsistent with the defense of non-involvement.

A. The Jury Instruction Issue:

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[1]Note: the *Doby* case was not argued to the trial court, but was raised in the direct appeal to the Arkansas Supreme Court

During the trial when it came time for discussion of the Jury instructions to be given, the following pertinent exchange took place (*See*, Appendix B27-29 for the entire discussion reproduced below is the abstract from the direct appeal):

> **Defense:** We do not want an instruction on a lesser included offense. *Nichols v. State*, 62 Ark. App. 212 (2000) applies. We deny we committed any murder at all or were an accomplice to a murder. We deny all liability for the murder. For the jury to be instructed on a lesser included offense is inconsistent with our defense.
>
> **Prosecution**: In the *Nichols* case the defendant requested lesser included, but also denied he had done anything. He was asking to submit two inconsistent defenses to the jury and the court said it was proper to deny the lesser included offense instruction in that situation. Here the Defense says no murder took place but we say it did, there is no inconsistent position on your part. We're entitled to the lesser included instruction.
>
> **Defense:** We don't say a murder didn't occur, we just deny all liability for it.
>
> **The Court:** The objection is noted, but the lesser included instruction will be given.
>
> In its discussion of this issue in the Arkansas Supreme Court it was noted that they had never decided the issue of whether the State could receive an instruction on a lesser included offense over the Defendant's objection (Appendix A35-36). However, they then

ruled, by a two part holding, in such a manner as to effectively "dodge" the issue[2]:

First: they held that the Petitioner could not be heard to complain on the issue because he had failed to move for a directed verdict on the lesser included charge (the charge he objected to be given (*See*, Appendix A7-8)); and

Second: because even though the Petitioner denied all involvement in the murder, he was actually only denying having the requisite mental state, not the act of the murder itself. The Arkansas Supreme Court held that reliance on *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986) was misplaced since in that case the defendant had denied the very act, in this case the act was conceded, it was only the state of mind that was at issue.(*See* Appendix A 22-23)

B Suppression of the Confession

At the time of the Petitioner's being brought in for questioning after the body had been discovered the evidence was abundantly clear that the Petitioner had just finished smoking marijuana and was "high." The officer who brought him in testified that the apartment he had picked him up from had a "cloud" of marijuana smoke in it (Appendix B11-12) and the Petitioner himself stated at the end of his confession that he was high when he was first brought it, but had "come down" since then (Appendix A13, Appendix C1). The bottom line being that it is abundantly clear that the Petitioner

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[2]As noted by the Dissenting opinion (Appendix A29-38) "This court must address the issue of whether the State is entitled to an instruction. . . The majority has not provided this analysis or answered the question posed by this issue." *Id.*

was "high" at the time he executed a waiver of his Miranda rights before the questioning.

The statement itself is over two hours long and transcribed it runs approximately one-hundred-fifteen (115) pages in length (Appendix A28) For the first hour of the questioning the police allowed the Petitioner to repeat his false story about the trip back to Alabama. They then revealed to him that they knew he was lying because they had found the body and they asked him if he would like to "start all over again." to which he replied he would (Appendix C3) He then began telling them the truth about what happened, but at one point directly asked the officers "is this tape going to be played in court" to which the officer responded "no.," (Appendix A18-19 and Appendix C4-5). Petitioner took the position in his appeal to the Arkansas Supreme Court that this exchange was a clear abrogation of his rights and further showed clearly that at the time he was mirandized that he did not have a clear understanding of the rights he was giving up and the statement should be suppressed. The Arkansas Supreme Court ruled that it was clear the Petitioner understood his rights based on a totality of the circumstances test, relying primarily on the fact his statement was cogent and not revealing of any delusional thinking. (Appendix A10-15). They also stated that since the Petitioner had already begun confessing that the direct lie about the effects of Miranda could not be said to have induced the confession so the argument was without merit (Appendix A19)

WHY THE WRIT SHOULD BE GRANTED

A. The Lesser Included Offense Issue

First of all, it should be noted that this court has never addressed the issue of whether it is proper to give a lesser included offense instruction over the objection of a criminal defendant. As noted by the Arkansas Supreme Court, when it is supported by even the slightest evidence, it is error to refuse a Defendant's request for a jury instruction on a lesser included offense (Appendix A25), *Britt v. State,* 344 Ark. 13, 38 S.W.3d 363 (2001). That this is a correct application of the U.S. Constitution is supported by this court's opinions in *Beck v. Alabama*, 447 U.S. 625 (1980) and *Hopkins v. Reeves*, 524 U.S. 88 (1998) and finds further support in Fed. Rule Crim. Pro. 31(c). However, this case involves an inapposite question that has never been addressed by this court which can be phrased as: *is it constitutional to give an instruction on a lesser included offense when such an instruction is objected to by the Defendant.* This question is compounded in the instant case by the Defendant's denial of any involvement in the crime whatsoever and the Arkansas Supreme Court's holdings in *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986) and *Nichols v. State*, 62 Ark. App. 212, 11 S.W.3d 451 (2000) which hold it is inconsistent for a defendant to deny any and all involvement in a crime and then turn around and ask the jury to be instructed on a lesser

included offense. In other words, the very specific question posed in this case is: "*is it constitutional to give an instruction on a lesser included offense when such an instruction is objected to by the Defendant and such an instruction may not be requested by the Defendant.*" [3]

The Arkansas Supreme Court found in the case at bar that there was a rational basis (i.e. there existed "even the slightest evidence" *Britt, Supra*) that supported the giving of the instruction on the lesser included offense but effectively ignored the question of whether it was permissible to give the instruction over the Defendant's objection (Appendix A25, 37) As noted by the dissenting opinion in the case (Appendix A29-38) the court failed to address the issue of whether it is proper to give an instruction on a lesser included offense, even if it is supported by the evidence, when the Defendant himself objects to the giving of that instruction (Appendix A37). Finally, both the dissent and the majority opinion take the position that the evidence supported the giving of the instruction and gave only passing consideration to the idea that the instruction would (pursuant to *Doby* and *Nichols,*

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[3]The Petitioner is mindful of the Arkansas Supreme Court's decision in *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995). However, that case rested on an interpretation of Ark. Code Ann. § 5-1-110(c). That statute was never argued or mentioned by the Petitioner in this case and its interpretation was not before the court as they duly noted in footnote number 6 to the majority's opinion (Appendix A28).

Supra) have properly been refused had the Petitioner requested it and the state objected.[4]

This is a constitutionally compelling and extremely important issue that has never been directly addressed by this court or any federal circuit and has only been addressed sparingly by the various states. The most exhaustive discussion of the issue Petitioner could find is in the infamous *au pair* case of *Commonwealth v. Woodward*, 427 Mass. 659, 694 N.E. 2nd 1277 (1998). In that heavily publicized case a British *au pair* was charged with First Degree Murder for the death of a baby in her care. The Jury was also instructed on the lesser included offense of Second Degree Murder. However, the Defendant objected to an instruction on the other lesser included offense of Manslaughter and the jury was not instructed on that offense. The Jury then found her guilty of Second Degree Murder and sentenced her to life in prison. However, in post-trial proceedings, the trial judge reduced the jury's verdict to Involuntary Manslaughter, gave her credit for two-hundred-seventy-nine (279) days served and set her free. On the state's appeal to the Supreme Judicial Court of Massachusetts from this reduction in the conviction, the court found it was

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[4]Admittedly the Supreme Court's opinion does mention *Doby*, but it claims the Petitioner's reliance is misplaced since the evidence would not require the jury to believe the Petitioner was guilty of capital murder or nothing at all because he did not deny the act of murder took place, only that he had the requisite mental state. *See*, Appendix A23 As noted herein, the Petitioner takes issue with this characterization of the matter.

error to have not given the manslaughter charge in the first place and that a lesser included offense charge should be given anytime the evidence supports it, no matter who requests or objects to it. In making this finding the court relied upon its prior holdings in the case of *Commonwealth v. Gould*, 413 Mass. 707 __ N.E. 2nd ___(1992) and a line of similar cases holding that if the evidence supports a finding on a lesser included offense then a judge must, upon request, give the instruction on that lesser offense. In finding that the rule applied to both the state and the defense the court in *Woodward* relied on *Commonwealth v. Thayer*, 418 Mass. 130, __ N.E. 2nd __ (1994) and related cases holding that the test to determine if a lesser included offense instruction was required was whether it was supported by the evidence, not who objects to it. In making their findings in this regard in the *Woodward* case, the court cited *Schmuck v. U.S.*, 489 U.S. 705 (1989) and particularly *Schmuck*'s 9th footnote which cited *Beck v. Alabama*, 447 U.S. 625 (1980) and Fed. R. Crim. P. 31(c) *Woodward* at fn. 8. However, their reliance on these cases is, in Petitioner's opinion, misplaced. In *Beck* the issue revolved around an Alabama statute that forbade the giving of lesser included offense instructions in a Capital Murder case and in *Schmuck* the issue revolved around a defendant's request for a lesser included instruction. All those cases held was that it is unconstitutional to impose the death penalty without permitting the jury to consider a true lesser included offense (*Beck*) and that a lesser included offense is defined by the elements of the greater and lesser offenses instead of by an "inherent relationship" test

(*Schmuck*). Contrary to the Massachusetts' seeming opinion of these cases, neither dealt with the issue of a defendant's objection to the giving of an instruction on a lesser included offense. Furthermore, the Petitioner here would take issue with the Massachusetts' court's holding regarding the objection to a lesser included instruction by defendant.

If the state charges a person with a crime then that person is entitled, if he so chooses, to make it an "all or nothing" affair. The state charged the Petitioner with Capital Murder (Appendix A4 and B20-21). As noted time and again by this court, the Constitutional requirement for conviction on a criminal charge is proof beyond a reasonable doubt. In the case at bar, the Petitioner attempted to hold the state to this requirement and make the state prove exactly that which they had charged, but was denied his right to do so because the state was allowed to throw a few extra offenses his way. Allowing the state to request and get instructions on lesser included offenses over a defendant's objection gives the state an unfair advantage in that they can charge someone with the most horrendous crime they can imagine knowing they'll get more than one shot at having that person convicted of something. It is an invitation to "overcharging" by a state if they know they will be able to rely on the giving of lesser included offense instructions to correct their misplaced zeal to obtain a conviction. It is the Petitioner's contention that when a state decides to charge a person with a crime, then

under the 5th, 6th and 14th Amendments to the U.S. Constitution, the person so charged is entitled to make it an all or nothing affair.[5] Allowing the state to charge a jury with lesser included offenses over the objection of a criminal defendant is an abrogation of the defendant's right to be found guilty of the crime charged beyond a reasonable doubt. It effectively gives the state more than one bite at the apple and is violative of Due Process.

Secondly, there is the issue raised by *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986) and *Nichols v. State*, 62 Ark. App. 212, 11 S.W.3d 451 (2000) that being the inconsistency of denying any involvement in a crime whatsoever and then having the jury instructed on lesser included offenses. If it is inconsistent for a criminal defendant to deny any involvement but request lesser included instructions, then surely the same must be said for the state. To hold otherwise is to deny Due Process and Equal Protection of the law to criminal defendants. The Petitioner herein has no doubt that if he had requested the jury instruction on the lesser included offense and the state had objected, on appeal the Arkansas Supreme Court would have held that pursuant to *Doby v. State*, 290 Ark. 408, 720

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[5]The wisdom of objecting to an instruction on a lesser included offense is not an issue here. Clearly the bulk of the requests for lesser included instructions will come from criminal defendants and, as is evident by this court's having never faced or ruled upon the issue, fewer still will object to their being given. However, the Petitioner's point is they should have the right to make such an objection and gamble on an "all or nothing" result.

S.W.2d 694 (1986) and *Nichols v. State*, 62 Ark. App. 212, 11 S.W.3d 451 (2000) it was proper to refuse the instruction as:

> when a defendant asserts that he is entirely innocent of any crime, no rational basis exists to instruct the jury on a lesser-included offense, as the only issue for the jury is whether the defendant is guilty as charged. *Id.* at 215 (emphasis added).

> "His defense was that he was entirely innocent of any crime [and that] there was no truth at all to the state's case [therefore it is] a case of all or nothing [and there is] no rational basis to give [a lesser-included instruction]. *Id.* (discussing the court's analysis in *Doby*)

> Doby rested his entire defense on his credibility against that of the officers. So as a practical matter, it came down to whom should the jury believe. There would be no rational basis to find the officers lied in part in this case. Their testimony so sharply conflicted with Doby's that it would not be reasonable to expect a jury to pick and choose and come up with a finding of a lesser offense when to do so would require a finding that Doby was a liar and the officers liars in part. If Doby had admitted possessing the drugs, it might make sense to require the charge of the lesser offense. But his defense was that he was entirely innocent of any crime: he possessed nothing. Therefore, the jury only had one question to decide, whether he was guilty as charged..

Doby at 412

A *Doby* like situation is exactly what is present in this case. In order to convict the Petitioner on any murder offense the jury had to believe that the Petitioner was a liar and his alleged accomplice, Jeremy Phillips, lied in part and told the truth in part. The Petitioner claimed that he was entirely innocent of any murder offense, either in the act or in any requisite mental state. In *Doby* the defendant denied both committing the act and having the requisite mental state. In the case at bar, it was admitted that the Defendant did not conduct the actual act of murder so all that is left is the requisite mental state and he completely and totally denied having any culpable mental state that fell into the definition of any murder, whether it be knowing, purposeful, reckless, negligent, or any other legally defined mental state. He had no idea a killing was going to take place at all. Under this circumstance the Petitioner is being denied equal treatment under the law since he is in a position that prevents him from requesting an instruction on a lesser included charge, but the state is not under the same restriction.

Finally, the Petitioner will concede that the cases in state courts in which this issue has arisen have generally ruled that lesser included instructions should be given whenever the evidence supports a finding on a lesser charge without regard to who requests or objects to the instructions. *See*, *Commonwealth v. Woodward*, 427 Mass. 659, 694 N.E. 2nd 1277 (1998) at fn. 8. However, Petitioner takes the position that those courts are incorrect and that under our constitutional scheme, a defendant is entitled to object to a lesser included charge and make a case an all or nothing

affair. The state has the burden of proof and is in total control of what a criminal defendant is charged with. They should not be permitted to "fudge" on the issue and rely on lesser included offenses to remedy their errors or misplaced zeal in bringing charges against someone. If a person is charged with Capital Murder and the state refuses to reduce the charge to First Degree Murder (which they can do at any time right up until the jury is instructed and which, if done in this case, would have avoided this entire issue), then the defendant should have the right to make them meet their burden on that charge or nothing at all. It is unconstitutional to give a jury instruction on a lesser included offense over the objection of the criminal defendant. Particularly when the defendant himself has no right to request the lesser included instruction himself. The 14th, 5th and 6th Amendments to the U.S. Constitution are called into issue on this matter and it is an issue that is ripe for resolution by this court.

B. Suppression of the Confession Issue

That the Defendant was "high" (i.e. intoxicated) at the time he executed his Miranda waiver cannot be disputed (Appendix A13-15 , Appendix B11-13 and Appendix C1-2) and that he didn't fully understand what he was doing in regard to his waiver and confession is clearly evidenced by his specific request to know if the tape of his confession was going to be played in court. The error is further compounded by the police officer's statement that it would not (Appendix A18-19 and Appendix C4). Petitioner takes the position that the evidence is clear he did not understand the import of his Miranda waiver, otherwise he would have never asked if the tape was going to be used and for the police to lie to him is

unforgivable because the tape was used in court and a transcript of the tape was introduced into evidence. (Appendix A28). The trial court erred in refusing to suppress the confession and the Arkansas Supreme Court erred in upholding this ruling. The Arkansas Supreme Court said it was relying on a totality of the circumstances test to determine if the confession was voluntary, but they truly only discussed the cogent nature of his statement and the fact he repeated the same lie about the trip back to Alabama (Appendix A14). They further compound their error by finding the lie about the use of his confession in court was made only after he had already confessed and it did not, therefore, actually induce the confession. Petitioner takes the position that anytime a direct lie about the effects of a Miranda warning is made, such as happened in this case, the entire confession is tainted and certainly the knowing and voluntary nature of a waiver of Miranda rights is called into issue. The confession should have been suppressed and the failure to do so violated the Petitioner's 5th Amendment rights.

CONCLUSION

Neither this court nor any of the federal circuits have directly ruled on the issue of whether it is proper to give a jury instruction on a lesser-included charge over the objections of a criminal defendant. This issue is of a compelling interest and this case presents that issue ripe for review by this court. This court should grant the Petition for Writ of Certiorari and enter its ruling that the giving of such an instruction over the Defendant's objection is an abrogation of his right to make the state prove their charges against him beyond a reasonable doubt. Finally, this court should find that the courts of Arkansas erred in refusing to suppress the confession of the Petitioner as he was intoxicated when he executed his Miranda waiver and a direct and explicit lie regarding the effect of that waiver was told to him by the interview officers.

Respectfully Submitted,
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By: _____
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CERTIFICATE OF SERVICE

Comes now Lynn D. Lisk, Attorney for the Petitioner in this matter and affirms that 3 copies of the foregoing pleading were served via ( ) facsimile copy, (X) hand delivery, ( ) 1st class U.S. Mail, or ( ) registered mail upon the office of the Attorney General for the state of Arkansas on the 12 day of August, 2003

_____
Lynn D. Lisk

APPENDIX A.

ARKANSAS SUPREME COURT OPINION

GRILLOT v. STATE, CR 01-792 (Ark. 5-22-2003)
Eric z. GRILLOT, Appellant v. STATE of Arkansas, Appellee
CR 01-792
Supreme Court of Arkansas
Opinion delivered May 22, 2003

Appeal from Van Buren Circuit Court; David Lee Reynolds, Judge; *affirmed.*

Ed Webb & Associates, by: Lynn D. Lisk, for appellant.

Mark Pryor, Att'y Gen., by: Clayton K. Hodges, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice.

Appellant Eric Z. Grillot was convicted by a jury of first-degree murder, aggravated robbery, theft of property, and hindering apprehension, and now raises five points on appeal. Grillot first argues that the circuit court erred in refusing to suppress his confessions. He also challenges the sufficiency of the evidence to support his convictions. For his third and fourth points, Grillot claims that the circuit court erred in denying his motion for a new trial based on juror misconduct and erred in refusing to allow defense counsel to argue different burden-of-proof standards in closing argument. In his final point, he contends that the model jury instruction for capital murder contains an incorrect statement of the law and that it was error for the circuit court to instruct the jury on lesser-included offenses.

On February 14, 1998, Eric Grillot left his home in Alabama with Jeremy Phillips and his roommate Will Jackson. The three were going to drop Phillips off in Arkansas where his family lived. They drove all night in Jackson's truck and were stopped by law enforcement officers once in Dumas for speeding while Grillot was driving. Upon arriving in the Fairfield Bay area about 7:00 a.m. on the morning of the 15th, the three stopped at the home of Grillot's parents in Shirley where they visited for one or two hours. Jackson had never been to Fairfield Bay, so they drove him around showing him the area. During the drive, they stopped at a gas station in Greers Ferry where Phillips purportedly made some phone calls in an attempt to obtain marijuana. Eventually, they went to a remote undeveloped area of Fairfield Bay, known as "the Rocks," and waited for delivery of the marijuana.

All three men were sitting in the truck, Grillot in the driver's seat, Jackson in the front passenger seat, and Phillips in the back seat behind Jackson, when Phillips put a .44 caliber pistol to the back of Jackson's head and shot him, killing him instantly. The evidence is disputed as to whether Grillot was awake at the time of the shooting. Nonetheless, after Jackson was shot, Grillot drove the truck a short distance to some trees and helped Phillips remove the body and drag it into the woods. Phillips wiped some blood off the back of the seat, and then Grillot drove Phillips to his mother's house and dropped him off before heading back to Alabama in Jackson's truck.

When he reached Alabama, Grillot abandoned the truck at a storage facility and walked home. He made a phone call to his parents to let them know he had made it back to Alabama

safely and then went to work. Later, he threw the keys to the truck and Jackson's wallet into a nearby canal. The next day, Jackson's father called and asked if Grillot had seen Jackson. Grillot told him that the last time he saw Jackson was just before he went to work after the two of them had returned to Alabama. Grillot also told Jackson's father that Jackson had received a job offer in Florida, so he might have gone there. On February 20, 1998, Jackson's father filed a missing person's report with the Baldwin County Sheriff's Office in Alabama.

Subsequently, after Jackson's abandoned truck was found by Alabama law enforcement officers, Grillot was called in for questioning on March 2, 1998. At that time, he told a deputy with the Baldwin County Sheriff's Office that he had gone with Jackson to drop Phillips off in Arkansas, and had not seen Jackson since they returned to Alabama. A short time later, Grillot moved back to Arkansas to live with his parents.

On March 10, 1998, the Van Buren County Sheriff's Office questioned Grillot and Phillips following receipt of the missing person's report that listed Grillot and Phillips as the last two people seen with Jackson. Grillot told the Van Buren investigators the same story he had previously told to the Sheriff's Office in Baldwin County, Alabama. Then, on March 13, 1998, Jackson's body was found where Grillot and Phillips had left it in the woods. Grillot and Phillips were picked up and transported to the Van Buren County Sheriff's Office for further questioning. It was at this point that Grillot admitted helping Phillips get rid of the body and evidence of the murder. However, he denied knowing anything about Phillips's plan to kill Jackson. He stated that he was asleep in the driver's seat of the truck at the time Jackson was shot.

According to Grillot, Phillips had told him that he had been hired to kill Jackson. Moreover, Grillot claimed Phillips agreed to give him $3,000 "for his trouble."

Phillips himself confessed to shooting Jackson. His story, at that time, aligned with Grillot's version. Phillips said that Grillot did not know about the murder-for-hire contract. Phillips subsequently pleaded guilty to first-degree murder and was sentenced to life imprisonment.

Initially, Grillot was charged with hindering apprehension, aggravated robbery, and theft of property. However, Phillips changed his story and told the police that Grillot knew about the murder-for-hire contract and helped with its planning and commission. According to Phillips, they had agreed for him to take the fall, but because Grillot began saying bad things about him, he decided to tell the truth. As a result, the information filed against Grillot was amended to include a count of capital-felony murder.

Grillot's case went to trial on August 23, 2000. On August 24, 2000, following voir dire and jury selection, one juror disclosed to the court that he had come into contact with Grillot's sister after she overheard him talk with his wife about the case. The court proceeded to conduct an in camera hearing, and the State moved to have the juror removed for cause. Grillot objected to the State's motion, and the circuit court ruled against the State.

At the conclusion of the three-day trial, Grillot was convicted of first-degree murder, aggravated robbery, theft of property, and hindering apprehension. He was sentenced to a total of twenty years' imprisonment. Grillot appealed his

convictions to the Arkansas Court of Appeals, which then certified the case to this court. We accepted certification and now affirm the convictions. I. Sufficiency of the Evidence

Preservation of Grillot's right against double jeopardy requires that we consider his challenge to the sufficiency of the evidence before we consider alleged trial error even though the issue was not presented as the first issue on appeal. Davis v. State, 350 Ark. 22, 86 S.W.3d 872 (2002). In order to contest the sufficiency of the evidence to support a conviction on appeal, the defendant must move for a directed verdict at the close of the prosecution and again at the close of all the evidence. Ark.R.Crim.P. 33.1(a) (2002); Doss v. State, 351 Ark. 667, 97 S.W.3d 413 (2003). Moreover, we have made it clear that a defendant, in making his motions for directed verdict, must anticipate an instruction on lesser-included offenses and specifically address the elements of that lesser-included offense on which he wishes to challenge the State's proof in his motion. Brown v. State, 347 Ark. 308, 65 S.W.3d 394 (2001).

At the close of the State's case-in-chief, Grillot made the following argument:

[D]efense moves for a directed verdict as to Count 1, Capital Murder. On that basis, Judge, the evidence is clear that there is no underlying felony that has been proven in this case. . . . Jeremy Phillips [testified] he did it for premeditation, that he basically did it for hire. . . . [T]he State would have to show that Eric Grillot is an accomplice. There is no testimony whatsoever that shows Eric Grillot is an accomplice to Jeremy Phillips in that — when he committed those murders. The statements and testimony is

that basically Jeremy Phillips did this on his own, that anything Eric Grillot did was basically to cover up the murder, not to aid, abet or assist in the murder which was under the accomplice theory. So, we would ask for a directed verdict on the capital murder charge.

Then, at the conclusion of all the evidence, Grillot moved for a directed verdict stating:

[A]s to count 1, capital murder[,] . . . [t]he evidence is clear that Jeremy Phillips was the person who pulled the trigger and the person who shot Will Jackson. That fact is uncontroverted. The only way that Mr. Grillot can be guilty of capital murder would be if he is found to be an accomplice; that he aided and abetted in the planning and the only evidence that indicates that that may have been true is Jeremy Phillips' statement. . . . Which is uncorroborated. The law is that his statement has to be corroborated with some evidence, independent evidence, to indicate the charges will be true. As the court said . . . at the end of the State's case[,] the only evidence the Court could find would be circumstantial evidence but felt circumstantial evidence was sufficient to go to the jury. Circumstantial evidence is not sufficient uncorroborated to make a finding that Eric Grillot was an accomplice. . . . [M]y understanding is that the State is amending the charge to add murder for hire. Well, the testimony is that the murder for hire was — was an act with Jeremy Phillips the shooter, testified that he was hired to do that. His testimony was that Eric did not plan. Again, that is accomplice testimony. It is uncorroborated. The only evidence we have of that is what Jeremy Phillips says. So as to the capital murder charge I move for a directed verdict on that charge.

As a threshold matter, the State contends that the motion for directed verdict quoted above is insufficient to preserve a sufficiency challenge to his first-degree murder conviction because the directed-verdict motion addressed only the capital murder charge and not the lesser-included offenses. We agree.

This court has held that, in order to preserve challenges to the sufficiency of the evidence supporting convictions for lesser-included offenses, defendants must address the lesser-included offenses either by name or by apprising the trial court of the elements of the lesser-included offenses questioned by their motions for directed verdict. Haynes v. State, 346 Ark. 388, 58 S.W.3d 336 (2001) (concluding that challenge to the sufficiency of the evidence to support a first-degree murder conviction was procedurally barred when the defendant was charged with capital murder and failed to move specifically for directed verdict on the lesser-included offense of first-degree murder); see also Ramaker v. State, 345 Ark. 225, 46 S.W.3d 519 (2001).

In the instant case, Grillot failed to move for a directed verdict on the lesser-included offense of first-degree murder. Not only did he fail to address the lesser-included offense of first-degree murder by name; but, he also failed to address the elements of the lesser-included offense as distinguished from the elements of the capital-murder charge. Contrary to the dissent's assertion that "there was no distinction between capital murder and first-degree murder for this court to consider," the elements that the State had to prove in order to obtain a conviction on either offense were different. The instructions given to the jury demonstrate that the elements at issue in this case were not identical. The capital-murder

instruction and the first-degree-murder instruction given at trial read, in relevant part, as follows:

Eric Grillot is charged [as an] accomplice in the offense of capital murder. To sustain . . . this charge, the State must prove the following things beyond a reasonable doubt. First, that Eric Grillot or an accomplice entered into an agreement that they would cause the death of another person in return for anything of value. And second, that pursuant to that agreement, they caused the death of William Jackson. Or . . . that with premeditated and deliberated purpose of causing the death of any person, Eric Grillot or an accomplice caused the death of William Jackson.

* * * *

If you have a reasonable doubt of the defendant's guilt of capital murder, then you will consider the charge of first degree murder. To sustain this charge, the State must prove the following things beyond a reasonable doubt. That with the purpose of causing the death of William Jackson, Eric Grillot or an accomplice caused the death of William Jackson.

Thus, in making his directed-verdict motion, Grillot was required to set forth the differing elements.[fn1] See Jenkins v. State, 350 Ark. 219, 85 S.W.3d 878 (2002); Brown v. State, supra; Walker v. State, 318 Ark. 107, 883 S.W.2d 831 (1994).[fn2]

Nonetheless, Grillot asserts that because he denied any and all liability for capital murder, he did not believe a lesser-included instruction would be warranted. On that basis, he contends there was no need to address the lesser-included

offenses in his directed-verdict motions. This argument is without merit for the reasons stated later in this opinion when we address Grillot's asserted point of error regarding jury instructions. As noted by this court in Brown v. State, supra, a defendant, in making his motion for directed verdict, must anticipate an instruction on lesser-included offenses. 347 Ark. 308, 65 S.W.3d 394.

In any event, the rules of criminal procedure and our case law are clear. As already stated, in order to preserve an argument based on the sufficiency of the evidence, a defendant must move for a directed verdict with specificity at the close of the State's case-in-chief and again at the close of all the evidence. Ark.R.Crim.P. 33.1(a); Haynes v. State, supra. Additionally, we have consistently held that first-degree murder is a lesser-included offense to premeditated capital murder. McFarland v. State, 337 Ark. 386, 989 S.W.2d 899 (1999); Allen v. State, 310 Ark. 384, 838 S.W.2d 346 (1992); Bell v. State, 296 Ark. 458, 757 S.W.2d 937 (1986). A mere belief that a jury instruction on a lesser-included offense should not be submitted does not obviate the defendant's duty to move for a directed verdict with specificity. Grillot also challenges the sufficiency of the evidence supporting his convictions for aggravated robbery and theft of property, contending that there was no evidence he intended to deprive the owner of any property. A person commits aggravated robbery if he commits robbery and he is armed with a deadly weapon or represents by word or conduct that he is so armed, or he inflicts or attempts to inflict death or serious physical injury upon another person. Ark. Code Ann. § 5-12-103 (Repl. 1997).

A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102 (Repl. 1997). A person commits theft of property if he "[k]nowingly takes or exercises unlawful control over the property of another person with purpose of depriving the owner thereof." Ark. Code Ann. § 5-35-103(a)(1) (Repl. 1997). Deprivation of property requires the disposal "under circumstances that make its restoration unlikely." Ark. Code Ann. § 5-35-101(4)©) (Repl. 1997).

In this case, Phillips took money from Jackson after killing him. In addition, Grillot took Jackson's truck and abandoned it in another state. Then, he threw the keys to the truck and Jackson's wallet in the Gulf of Mexico. All these acts stemmed from an event where a deadly weapon was used. From these facts, a jury could reasonably infer that neither the truck nor the wallet were likely to be restored to Jackson, or his estate. Accordingly, we conclude there was sufficient evidence to support the aggravated robbery and theft-of-property convictions.

II. Motion to Suppress

In his first point on appeal, Grillot sets forth several arguments relating to the voluntariness of his confession. First, he argues that the waiver of his Fifth Amendment rights was not voluntary because he was under the influence of drugs. Next, Grillot maintains he was illegally arrested, and, thus, his confession should have been suppressed as fruit of the poisonous tree. Lastly, he contends that when the nature and tenor of an interview change, a suspect who has already

been Mirandized, must be re-Mirandized. Based on these arguments, Grillot maintains that the circuit court erred in denying his motion to suppress his confession. For authority, Grillot relies solely on the decisions of the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1996), and Dickerson v. United States, 530 U.S. 428 (2000). The Supreme Court has held that, on appeal, the voluntariness of custodial statements is tested by viewing the totality of the circumstances. Frazier v. Cupp, 394 U.S. 731, 89 S.Ct 1420, 22 L.Ed.2d 684 (1969); see also Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). Likewise, in reviewing a trial court's refusal to suppress a confession, we make an independent determination based upon the totality of the circumstances. See Cox v. State, 345ark. 391, 47 S.W.3d 244 (2001); Riggs v. State, 339 Ark. 111, 3 S.W.3d 305 (1999). The ruling will only be reversed if it is clearly against the preponderance of the evidence. Giles v. State, 261 Ark. 413, 549 S.W.2d 479 (1977). Any conflict in the testimony of different witnesses is for the trial court to resolve. Cox v. State, supra.

This court has also applied two other standards of review in cases involving the suppression of custodial statements. We have recently stated:

In reviewing a trial judge's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances, viewing the evidence in a light most favorable to the State [appellee], and we reverse only if the ruling is clearly against the preponderance of the evidence.

Jenkins v. State, 348 Ark. 686, 701-02, 75 S.W.3d 180, 190 (2002) (emphasis added); Howell v. State, 350 Ark. 552, 89 S.W.3d 343 (2002); Fairchild v. State, 349 Ark. 147, 76 S.W.3d 884 (2002); Jones v. State, 348 Ark. 619, 74 S.W.3d 663 (2002); Bunch v. State, 346 Ark. 33, 57 S.W.3d 124 (2001); Lacy v. State, 345 Ark. 63, 44 S.W.3d 296 (2001); Hill v. State, 344 Ark. 216, 40 S.W.3d 751 (2001); Barcenas v. State, 343 Ark. 181, 33 S.W.3d 136 (2000); Smith v. State, 334 Ark. 190, 974 S.W.2d 427 (1998); Wright v. State, 335 Ark. 395, 983 S.W.2d 397 (1998); Tabor v. State, 333 Ark. 429, 971 S.W.2d 227 (1998); Noble v. State, 319 Ark. 407, 892 S.W.2d 477 (1995); Johnson v. State, 307 Ark. 525, 823 S.W.2d 440 (1992); Moore v. State, 303 Ark. 514, 798 S.W.2d 87 (1990). The "light most favorable to the State" language repeated throughout this entire line of cases can be traced to Moore v. State, which applied, albeit erroneously, the standard of review for search-and-seizure cases[fn3] to the voluntariness of a confession. Moore v. State, 303 Ark. 514, 798 S.W.2d 87 (1990) (citing Russell v. State, 295 Ark. 619, 751 S.W.2d 334 (1988)); see also Tabor v. State, 333 Ark. 429, 971 S.W.2d 227 (1998) (citing Norman v. State, 326 Ark. 210, 931 S.W.2d 96 (1996)).

Another line of cases sets out a slightly different standard for the review of a trial court's denial of a defendant's motion to suppress a confession:

We make an independent determination based upon the totality of the circumstances, with all doubts resolved in favor of individual rights and safeguards.

Bisbee v. State, 341 Ark. 508, 17 S.W.3d 477 (2000); Davis v. State, 275 Ark. 264, 630 S.W.2d 1 (1982) (Davis I); Giles

v. State, 261 Ark. 413, 549 S.W.2d 479 (1977); Sutton v. State, 262 Ark. 492, 559 S.W.2d 16 (1977); Watson v. State, 255 Ark. 631, 501 S.W.2d 479 [501 S.W.2d 609] (1973); Smith v. State, 240 Ark. 726, 729, 401 S.W.2d 749, 751 (1966).

We now take this opportunity to clarify the appropriate standard of review for cases involving a trial court's ruling on the voluntariness of a confession: We make an independent determination based upon the totality of the circumstances. Cox v. State, supra. This language is in keeping with the standard of review enunciated by the Supreme Court in Frazier v. Cupp, supra. In so holding, we overrule any prior decisions to the extent they are inconsistent with this opinion.[fn4]

A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. Jones v. State, 344 Ark. 682, 42 S.W.3d 536 (2001). In order to determine whether a waiver of Miranda rights is voluntary, this court looks to see if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. Id.

Here, it is undisputed that Grillot was in custody at the time he confessed. Moreover, it is undisputed that he signed a form that reflects an acknowledgment and waiver of his Miranda rights, and his agreement to give a statement and answer questions. The statement was taped and later transcribed. Approximately two and one-half hours elapsed from the time he signed the waiver until the time he finished

giving his statement.

A. Intoxication

Grillot asserts it is reasonable to infer that he was under the influence of marijuana at the time he signed the "Rights Form" waiving his Miranda rights. According to the transcript of his statement, the following colloquy took place near the end of the interview:

OFFICER 1: Are you high right now or you straight?

Grillot: Sober as hell.

OFFICER 2: You haven't smoked or drank anything today?

Grillot: Yes, I have today right before I come in here.

OFFICER 2: What time? But you are not high now?

Grillot: No man, no, I wasn't high thirty or forty-five minutes ago.

OFFICER 3: Well, let's just do it this way, do you feel like you are impaired?

Grillot: No, no.

When an appellant claims that his confession was rendered involuntary because of drug or alcohol consumption, the level of his comprehension is a factual matter to be resolved by the trial court. Jones v. State, 344 Ark. 682, 42 S.W.3d 536 (2001). In testing the voluntariness of one who claims

intoxication at the time of waiving his rights and making a statement, this court determines whether the individual was of sufficient mental capacity to know what he was saying — capable of realizing the meaning of his statement — and that he was not suffering from any hallucinations or delusions. Id.

In the instant case, Grillot makes no claim that he did not have sufficient mental capacity, or that he was unable to understand the meaning of his statement. Moreover, there is no evidence that he was suffering from any hallucinations or delusions. In fact, during the first part of the interview, Grillot detailed the same story he had previously told Jackson's father and law enforcement officers in both Alabama and Arkansas. Additionally, he cogently fielded questions asked by the investigating officers. The fact that Grillot was able to relate such a detailed account indicates that he was not suffering from any mental disabilities. See, e.g., Jones v. State, 344 Ark. at 689, 42 S.W.3d at 541 ("[I]t is significant in making a finding of voluntariness that the accused answered questions without indications of physical or mental disabilities."); see also Riggs v. State, 339 Ark. 111, 3 S.W.3d 305 (1999) ("Rational response to questioning is a legitimate factor for the trial court to consider.").

The record here does not indicate that Grillot was under the influence of drugs such that he did not realize the meaning of his statement. Prior to his confession, Grillot had been interviewed twice by police officers, and he waived his Miranda rights on both occasions. Additionally, the transcript of Grillot's confession reveals that he was completely lucid. Based on our review of the evidence, we cannot say that the circuit court's ruling is clearly against the preponderance of the evidence.

B. Illegal Arrest

Grillot also alleges that because he was lured to the station on the pretext of just answering a few follow-up questions, his arrest was pretextual, and therefore illegal, and the statement should be suppressed as fruit of the poisonous tree. For authority, he cites State v. Shepherd, 303 Ark. 447, 798 S.W.2d 45 (1990). In Shepherd, police used an illegal subpoena to gain entrance into a defendant's house where they then seized evidence in "plain view." Id. The trial court ruled that the prosecutor abused its subpoena power because the real objective was to gather evidence. Id. The evidence was suppressed and we affirmed. Id.

The Shepherd case is inapposite. Here, the sheriff's deputies did nothing illegal when they asked Grillot to answer some follow-up questions concerning Jackson's death. In fact, Grillot concedes that he went voluntarily to the sheriff's office to answer questions about the death of William Jackson. Upon being subjected to custodial interrogation, he was entitled to the Miranda warnings. See Miranda v. Arizona, supra. As noted earlier, Grillot was informed of his Miranda rights and waived them.

C. Re-Mirandization

Grillot's principal argument concerning the voluntariness of his confession deals with the concept of "re-Mirandizing." When Jackson was first reported missing, Grillot told the police a rendition of events that placed Jackson in Alabama. The sheriff's deputies later found Jackson's body in the Fairfield Bay area, which indicated that Jackson had never returned to Alabama and, therefore, Grillot was lying.

Officers transported Grillot to the sheriff's office to answer questions about Jackson's death. Grillot started out telling officers the same story he had told earlier. Then, the interviewing officers told Grillot they knew he was lying because they had found the victim's body.

According to Grillot, at the moment this change in the interview's focus and nature occurred, that is, when the officers asked him "do you want to start again," they should have re-Mirandized him. Moreover, he asserts the Miranda warnings provide a "bright line" test for officers. Dickerson v. United States, 530 U.S. 428 (2000). This court applied the Miranda ruling soon after it was announced by the United States Supreme Court, and early on, we held that a suspect need not be re-Mirandized during continuous interrogation. See, e.g., Sossamon v. State, 245 Ark. 306, 432 S.W.2d 469 (1968) (Miranda warnings need not be repeated after an overnight stay at the police station). Moreover, our court has also held that Miranda warnings must only be repeated when the circumstances have changed so seriously that the accused's answers are no longer voluntary, or the accused is no longer making a knowing and intelligent relinquishment or abandonment of his rights. Jones v. State, supra.

Recently, we addressed an analogous situation with strikingly similar facts. See Upton v. State, 343 Ark. 543, 36 S.W.3d 740 (2001). In Upton, the defendant was asked to come to the police station and give a statement. Id. He was Mirandized and during questioning gave two statements. Id. At first, following the Miranda warnings, the defendant disavowed any knowledge of or complicity in the murder. Id. Later, after he was told that his friend had placed him at the crime scene, he confessed to the murder. Id. That interview

process lasted approximately two hours. Id.

In the Upton case, this court concluded that the defendant's status changed from that of a voluntary witness to that of a suspect. Id. Nonetheless, we held that the initial Miranda warnings were sufficient and there was no Fifth Amendment violation. Id. In so holding, this court first noted that a statement made voluntarily after a two-day hiatus from the Miranda warnings was constitutional. Id. We also relied upon a decision by the Supreme Court of Connecticut involving similar facts and quoted the following language with approval:

> The disclosure that Miranda requires must be made no later than the time when an accused is taken into custody. When the police are conducting a good faith precustodial investigation at police headquarters, they may have difficulty in determining the precise moment when questioning turns into custodial interrogation and Miranda warnings are required.
> Although the uncertain line between questioning and custodial interrogation does not excuse late warnings, it does provide justification for the validity of good faith early warnings which are sufficiently proximate to formal custody to alert the person being questioned to the importance of these constitutional rights.

Id. (quoting State v. Burge, 195 Conn. 232, 247-49, 487 A.2d 532, 543 (1985)). It therefore follows that in the instant case, where the interview lasted approximately two and one-half hours and took place without a break in time, the initial Miranda warnings were sufficient.

D. False Promise

In a related argument Grillot appears to contend that his confession was induced by the officer's statements. Specifically, he states, "[t]he police clearly intended the Appellant to rely upon their false statement about his Miranda rights and go forward in confessing his involvement in the murder." He then suggests "the clear spirit and import of Miranda and Dickerson is that they may not lie about the meaning of a suspect's Miranda rights." Grillot's argument stems from the following colloquy that took place during the interview:

Grillot: He said he got paid for it.

OFFICER: Got paid for it?

Grillot; Yeah. Said somebody wanted him dead.

OFFICER: Did he say who or why?

Grillot: I don't know. Somebody wanted Will dead and he was gettin' paid for it.

OFFICER: Do you believe him?

Grillot: I don't know, I don't believe him. I think, I don't know. I —

OFFICER: I'm just asking your opinion as far as why you think [Phillips] did it?

Grillot: [Phillips is] not here listening to every f***in' word

I say, is he?

OFFICER: No Sir.

Grillot: Is this going to be played in court?

OFFICER: No, the tape won't. They might ask you to testify. But we're just talking right now. . . .[fn5]

Grillot maintains the above statement effectually abrogated the earlier Miranda warnings because the officers lied about the effect of the Miranda waiver. More particularly, he contends his confession was involuntary because the Miranda warnings advise an accused that a confession can be used in court, while the officer told him the tape would not be played in court.

For a statement to be involuntary, the confession must have been induced or influenced by the police officer's statements. Bisbee v. State, 341 Ark. 508, 17 S.W.3d 477 (2000). Before the sheriff's deputy ent about whether or not the tape would be played in court, Grillot had already confessed. Thus, his confession could not have been procured by the statement. Additionally, taken in context, it appears Grillot was only concerned about the possibility of Phillips hearing his confession. Accordingly, for the reasons stated above, we cannot say that the circuit court's denial of Grillot's motion to suppress his custodial statements was clearly against the preponderance of the evidence.

III. Juror Misconduct

Grillot's third argument is that the circuit court erred in

denying his motion for a new trial based upon juror misconduct. Upon being selected as a juror, John Patterson called his wife and discussed the case with her. Grillot's sister overheard the telephone conversation and talked with Patterson about the case. This information was brought to the court's attention, whereupon the court held an in camera hearing to investigate the matter. The State asked that Mr. Patterson be removed from the jury. Grillot objected, arguing that the contact was minimal and he would "take [Mr. Patterson] at face value."

This point is without merit. We have held that a party cannot complain on appeal about relief to which he agreed or sought. Goff v. State, 341 Ark. 567, 19 S.W.3d 579 (2000). Grillot cannot argue below against the removal of a juror for cause, and then complain on appeal that he was prejudiced by that same juror being on the panel. In any event, without further inquiry or investigation, Grillot accepted the juror's testimony during the in camera hearing.

IV. Closing Arguments

For his fourth point, Grillot claims the circuit court erred in refusing to allow defense counsel to explain the various burden-of-proof standards during closing argument. Without citation to authority, he asserts that a criminal defendant has a right to compare and contrast the various standards of proof to ensure a jury's understanding. We have stated on numerous occasions that we will not consider arguments that are not supported by citation to authority or convincing argument, and it is not apparent without further research that the argument is well taken. See Kelly v. State, 350 Ark. 238, 85 S.W.3d 893 (2002); Wooten v. State, 351 Ark. 241, 91

S.W.3d 63 (2002).

Furthermore, Grillot's argument is not persuasive. The trial court is given broad discretion to control counsel in closing arguments, and we will not interfere with that discretion absent a manifest abuse of discretion. Smith v. State, ___ Ark. ___, 98 S.W.3d 433 (2003); Leaks v. State, 339 Ark. 348, 5 S.W.3d 448 (1999). It is the trial court's duty to maintain control of the trial and to prohibit counsel from making improper arguments. Smith v. State, supra.

At issue is the prosecutor's objection to defense counsel's use of a chart illustrating and comparing the various burden-of-proof standards used in the law. The circuit court allowed Grillot to use the chart but ruled that "he may not refer to any burden of proof other than `beyond a reasonable doubt' that is the standard in this case." In making that ruling, we conclude that the circuit court properly guarded against the jury becoming confused by other burden-of-proof standards that are inapplicable in criminal cases. Indeed, the circuit court explained the proper burden of proof to the jury. Therefore, we conclude no manifest abuse of discretion has been demonstrated.

V. Jury Instructions

In his final point on appeal, Grillot makes a two-prong attack on the instructions given to the jury. He contends that the model jury instruction for capital murder contains an incorrect statement of the law, and that it was error for the circuit court to instruct the jury on lesser-included offenses. This point is also without merit.

Capital-Murder Jury Instruction

Grillot argues that the model jury instruction for capital murder (AMI Crim.2d 1001) erroneously states the law. Yet, Grillot was acquitted of capital murder when the jury found him guilty of first-degree murder as a lesser-include offense. This court has repeatedly held that it will not reverse and remand for a new trial in the absence of prejudice. Hill v. State, 318 Ark. 408, 887 S.W.2d 275 (1994). Indeed, a verdict renders an instructional error harmless when the jury finds against appellees on the issue involved in the instruction. Cates v. Brown, 278 Ark. 242, 645 S.W.2d 658 (1983). An erroneous instruction is harmless when the jury rejects the theory of the instruction. Sasser v. State, 338 Ark. 375, 993 S.W.2d 901 (1999) (citing Hall v. State, 326 Ark. 318, 93 S.W.2d 363 (1996)). Here, the jury rejected the charge of capital murder. Thus, any error resulting from that instruction is harmless.

Jury Instructions on Lesser-Included Offenses

Grillot denied any and all liability for capital murder. As such, he argues that the jury should not have been instructed on the lesser-included offense of first-degree murder. Grillot draws on a body of case law stating that it is erroneous to instruct a jury on a lesser-included offense when it is inconsistent with the defendant's denial of any and all liability for an offense.

An instruction on a lesser-included offense is appropriate when it is supported by even the slightest evidence. Britt v. State, 344 Ark. 13, 38 S.W.3d 363 (2001). An instruction should only be excluded when there is no rational basis for

giving it. Id. A trial court's ruling on whether to submit a jury instruction will not be reversed absent an abuse of discretion. Hill v. State, 344 Ark. 216, 40 S.W.3d 751 (2001).

In support of this point for reversal, Grillot relies upon our decision in Doby v. State, 290 Ark. 408, 720 S.W.2d 694 (1986). In that case, the defendant was charged with possession of a controlled substance with intent to deliver, and he denied ever possessing any drugs. Id. Officers testified that, after he was arrested, the defendant confessed to having drugs. Thus, the defendant rested his entire defense on his credibility against that of the officers, such that, as a practical matter, it came down to whom the jury should believe — the officers or the defendant. Id. We affirmed the trial court's refusal to give an instruction on a lesser-included offense stating, "[the officers's] testimony so sharply conflicted with Doby's that it would not be reasonable to expect a jury to pick and choose and come up with a finding of a lesser offense when to do so would require a finding that Doby was a liar and the officers liars in part." Id. The Doby court explained that where the defendant denies any act occurred, there may be no rational basis for an instruction on a lesser-included offense. See Flurry v. State, 290 Ark. 417, 720 S.W.2d 699 (1986).

Grillot's reliance on our decision in Doby is misplaced. Here, the testimony did not conflict in a manner that would require the jury to conclude Grillot was either guilty of capital murder or nothing at all. He did not deny the act of murder occurred; rather, he denied that he had the requisite mental state. In contrast, the jury in Doby was asked to decide whether or not a specific act occurred — possession of drugs. Here, the act of murder was conceded, and the jury

was required to decide whether Grillot acted purposely.

Also, Grillot was charged under a theory of accomplice liability. Under Arkansas law, a person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:

(1) Solicits, advises, encourages, or coerces the other person to commit it; or

(2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it.

Ark. Code Ann. § 5-2-403 (Repl. 1997). A person commits murder in the first degree if with a purpose of causing the death of another person, he causes the death of another person. Ark. Code Ann. § 5-10-101 (Repl. 1997). A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann. § 5-2-202(1) (Repl. 1997).

As stated earlier, a charge of capital murder includes the lesser-included offense of first-degree murder. See McFarland v. State, supra.. Thus, the question presented in this case is whether there was a rational basis to support an instruction on first-degree murder based upon accomplice liability. More specifically, there need only be some evidence presented at trial that could support a finding by the jury that Grillot purposely promoted or facilitated the first-degree murder.[fn6]

We recently addressed the scope of accomplice liability in Cook v. State, 350 Ark. 398, 86 S.W.3d 916 (2002). In that case, we said that a criminal defendant is an accomplice where the defendant renders the requisite aid or encouragement to the principal with regard to the offense at issue, irrespective of the fact that the defendant did not directly commit the murder. Id. Furthermore, a defendant may be liable as an accomplice if he assisted and actively participated in the crime. Id. Moreover, when two persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. Id. A participant cannot disclaim responsibility because he did not personally take part in every act that went to make up the crime as a whole. Id.

According to the undisputed evidence in this case, there was an initial plan between Grillot and Phillips, who had known each other since childhood, to set up a drug transaction in Fairfield Bay and then rob the dealer. Grillot drove Jackson's truck from Alabama to Arkansas. More importantly, he admitted to driving the truck to the remote location where the murder took place. It is not disputed that Phillips shot and killed Jackson, and then Grillot helped dispose of the victim's body and property. Additionally, some testimony indicates that Grillot was in on a scheme to murder Jackson for a fee because he expected to be paid "for his trouble." Moreover, when law enforcement officers first began investigating Jackson's disappearance, Grillot lied about the victim's whereabouts. Finally, he fled the scene of the crime. We have often stated that evidence of flight to avoid arrest may be considered by the jury as corroborative of guilt. Williams v. State, 347 Ark. 728,\ 67 S.W.3d 548 (2002); Flowers v. State, 342 Ark. 45, 25 S.W.3d 422\ (2000);

Cooper v. State, 317 Ark. 485, 879 S.W.2d 405 (1994).

In reviewing the propriety of giving a jury instruction, the issue is not one of sufficiency, but rather, the issue is whether the slightest evidence supports the instruction. Britt v. State, 344 Ark. 13, 38 S.W.3d 363 (2001). There is ample evidence to show that Grillot acted with purpose as an accomplice in promoting or facilitating the commission of the first-degree murder. Accordingly, we conclude that there was some evidence before the jury to rationally support the giving of an instruction on the lesser-included offense of first-degree murder.

Affirmed.

THORNTON and HANNAH, JJ., concur in part and dissent in part.

CORBIN, J., not participating.

[fn1] Under the dissent's analysis on this point, the issue of sufficiency of the evidence to support a conviction of any lesser-included offense would be preserved by a directed-verdict motion that addresses nothing more than an element common to both the crime charged and the lesser-included offenses.

[fn2] It should be noted that the prosecutor made the following disclosure before the trial started:

DEFENSE COUNSEL: [The bill of particulars] says the State intends to rely on the felony murder rule. Are you saying in addition that you are relying on the capital murder

statute that there was a felony committed in the furtherance of the felony that Will Jackson was killed?

PROSECUTOR: It is our position that it was a murder for hire and separate and apart from that or rather in addition to that, but not dependent upon that, it is — it was premeditated and deliberate. . . . There is a number of sub-sections under that capital murder statute.

DEFENSE COUNSEL: I understand that. One of them is murder for hire.

PROSECUTOR: One of them is capital felony murder, one of them would be murder for hire and the other might be premeditated and deliberated. All three of those may be able to be proved in this case. We've charged it as capital felony murder with aggravated robbery being the underlying offense.

DEFENSE COUNSEL: That's what you've charged.

PROSECUTOR: To the extent that the proof changes, then there may be some basis for reliance on one of those different sub-sections. But at this point the State is proceeding on the felony murder.

Before Grillot moved for a directed verdict at the close of the State's case-in-chief, the prosecutor moved to amend the pleadings to conform to the proof and reiterated his earlier statement regarding the scope of the capital murder charge:

PROSECUTOR: I just want to before we rest to reflect, I just want to make mention, that what we did yesterday morning when Ralph was asking sort of bill of particular-type

questions? About what section we were going under? And we told him premeditated and deliberate and murder for hire. . . . I just want to move to amend the pleadings to conform for what we told him yesterday before the jury was empaneled. . . .

THE COURT: I grant the motion.

PROSECUTOR: Thank you.

DEFENSE COUNSEL: As I understand the motion, now Judge, before the Court, and the ruling is the State has amended their felony information of capital murder to say it is murder for hire.

PROSECUTOR: No, you ask us yesterday morning about what sub-section we were going under? Under capital murder? And we told you pre-meditated and deliberate purpose to kill someone and murder for hire. That's all. So the only amendment is to the capital murder charge.

Based on the above-quoted colloquies between the prosecutor and defense counsel, it is clear that the State amended its capital-felony murder charge before the close of its case-in-chief and before Grillot moved for a directed verdict. As amended, the State's capital murder charge included capital-felony murder, premeditated capital murder, and murder-for-hire. See Ark. Code Ann. §§ 5-10-101(a)(1), (4), (7) (Repl. 1997).

[fn3] We have recently clarified our standard of review for determination of reasonable suspicion or probable cause as they relate to warrantless searches alleged to be in violation

of the Fourth Amendment to the United States Constitution. See Davis v. State, 351 Ark. 406, 94 S.W.3d 892 (2003) (citing Ornealas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

[fn4] We have determined that our application of "the light most favorable to the State" standard of review in Moore v. State, supra, and it progeny did not result in any error. Moreover, because the standard of review requiring all doubts to be resolved in favor of individual rights and safeguards is more stringent, a defendant could not have suffered any prejudice.

[fn5] The transcript of the statement is 115 pages long, and the above-quoted colloquy appears at page 79.

[fn6] The dissent notes that the issue of whether the State is entitled to an instruction on a lesser-included offense pursuant to Ark. Code Ann. § 5-1-110 (Repl. 1997) has been left unresolved, and urges this court to resolve the issue here. See State v. Jones, 321 Ark. 451, 903 S.W.2d 170 (1995); State v. McCormack, 343 Ark. 285, 34 S.W.3d 735 (2000). However, Grillot's point on appeal is that there was no rational basis to support the instruction; he has not argued the application of Ark. Code Ann. § 5-1-110 to the State's request for an instruction on a lesser-included offense. That issue was not argued to the trial court and has not been briefed by the parties. Accordingly, the issue is not before the court and we will not address it.

JIM HANNAH, Justice, concurring in part and dissenting in part.

I must respectfully dissent. I disagree with the holding that the failure to move for a directed verdict on first-degree murder precludes consideration of the issue of sufficiency of the evidence in this case. Grillot did not move for a directed verdict on premeditation and deliberation under capital murder; rather, he moved for a directed verdict on a lack of substantial evidence of accomplice liability. The elements of accomplice liability do not differ between capital murder and first-degree murder. Therefore, the trial court had all the issues before it in the directed-verdict motion, and the issue of sufficiency of the evidence is properly before this court.

Further, I do not agree that a criminal defendant is required to anticipate what charges the State may seek to submit to the jury. A criminal defendant cannot reasonably be expected to move for a directed verdict until he or she is made aware of the charges to be submitted to the jury. Additionally, we need not discuss Grillot's argument that the model jury instruction on capital murder erroneously states the law because the issue is moot. Also, I disagree that this court has previously addressed the issue of the nature and extent of the State's right to request and receive jury instructions.

Directed Verdict

The majority refuses to hear Grillot's appeal from the denial of his directed-verdict motion because although Grillot presented all necessary facts to the trial court for decision on the directed-verdict motion, he failed to include the specific words "first degree murder." Admittedly, Grillot moved for a directed verdict "as to Count 1, Capital Murder" and was convicted of the lesser-included offense of first-degree murder. However, it is obvious from the motion that Grillot

was asserting that there was no evidence of his liability as an accomplice. If he was not an accomplice to capital murder he could not be an accomplice to first-degree murder. This court traditionally has not required "magic words." See Mayfield v. State, 293 Ark. 216, 736 S.W.2d 12 (1987). It appears that is no longer the case. To refuse to hear the sufficiency-of-the-evidence issue in this case is to exalt form over substance.

Contrary to the majority opinion, the rule that a criminal defendant must move for a directed verdict not only on the charged crime but also on lesser-included offenses is simply not applicable in this case.[fn1] Grillot's motion for a directed verdict properly raised the issue of sufficiency of the evidence of accomplice liability in the trial court, and the issue of sufficiency of the evidence of accomplice liability is now properly before this court. Grillot's liability in this case was based on accomplice liability. There was never an issue of who actually committed the murder. Phillips confessed to the murder.

Grillot argued in his directed-verdict motion that there was insufficient evidence of accomplice liability to submit the issue of his liability as an accomplice to the jury. The trial court denied the motion, and Grillot now properly asks this court to determine whether the trial court erred in denying the motion.

The record is clear that Grillot's directed-verdict motion was based on a lack of evidence to prove accomplice liability. There is no distinction between the requirements for liability as an accomplice to first-degree murder as opposed to capital murder. All the elements the trial court needed to be aware of were raised by the motion. The motion is sufficient where

either the offenses or the required elements are contained in the motion. Ramaker v. State, 345 Ark. 225, 46 S.W.3d 519 (2001).

The rule that the directed-verdict motion must also address lesser-included offenses is based on a requirement that the trial court be apprised of alleged deficiencies in the case so that the directed-verdict motion may either be granted or the case reopened if necessary so the missing proof may be offered. Walker v. State, 318 Ark. 107, 883 S.W.2d 831 (1994). When the trial court ruled on Grillot's motion for directed verdict, the sufficiency of the evidence as, to the elements of accomplice liability to capital murder and the elements of accomplice liability for first-degree murder were being tested. The trial court was given an opportunity to rule on the sufficiency of the evidence as to the elements of accomplice liability. To require the trial court to rule on a motion for directed verdict as to the lesser-included offense in this case is to require a vain and useless act. This we will not do. Box v. State, 348 Ark. 116, 71 S.W.3d 552 (2002).

Where intent is at issue, moving for a directed verdict on capital murder due to a lack of evidence of premeditation and deliberation, but not moving for a directed verdict on the intent of purpose required under first-degree murder, means the trial court is never presented with the issue of whether the State presented adequate proof to the lesser intent required in first-degree murder. While the proof in a given case might not be adequate to show the premeditation and deliberation required for capital murder, it might be adequate to show purpose as required for first-degree murder. Because the trial court must be allowed to consider lower intent in lesser-included offenses, this court has required that a directed

verdict motion also speak to include lesser-included offenses. Walker, supra.

Under the facts of this case, however, the trial court was presented with all the issues it could decide on the directed-verdict motion on accomplice liability, and the issue of sufficiency of the evidence is properly before this court. Grillot was charged with capital murder as an accomplice and tried his case on the theory that he was not involved in the murder in any way. He alleged a lack of evidence of intent of accomplice liability. Intent with respect to the murder was not relevant to his motion based on accomplice liability. One is an accomplice to an offense committed by another if one "with the purpose of promoting or facilitating the commission of an offense" commits one of the enumerated acts such as aiding or encouraging. Ark. Code Ann. § 5-2-403 (Repl. 1997). Grillot either acted with purpose to promote and facilitate Will's murder by Phillips, or he was not an accomplice. In this case, there was no distinction between capital murder and first-degree murder for the court to consider even if Grillot had included first-degree murder in his directed-verdict motion.

It is also curious that Grillot is now being penalized for not moving for a directed verdict on a lesser-included offense before the trial court even decided whether the instruction was applicable. Grillot would have been refused had he later sought an instruction on first-degree murder because it was contrary to Grillot's theory of the case that he was not an accomplice. Doby v. State, 290 Ark. 408, 720 S.W.2d 694 (1986).

I must also note that there is something profoundly disquieting about a rule that requires a criminal defendant to "anticipate" the issues that may be presented to the jury as is currently required on directed-verdict motions. See Brown v. State, 347 Ark. 308, 65 S.W.3d 394 (2001). Naturally, Grillot was not specifically aware of what instructions would be submitted to the jury until the trial court made the decision on instructions after the close of the evidence. The renewal of the motion for directed verdict must occur before the jury is charged. Cathey v. State, 351 Ark. 464, 95 S.W.3d 753 (2003); Robinson v. State, 348 Ark. 280, 72 S.W.3d 827 (2002); Willis v. State, 334 Ark. 412, 977 S.W.2d 890 (1998); Rankin v. State, 329 Ark. 379, 948 S.W.2d 397 (1997); Webb v. State, 326 Ark. 878, 935 S.W.2d 250 (1996); Claiborne v. State, 319 Ark. 602, 892 S.W.2d 511 (1995); Marshall v. State, 316 Ark. 753, 875 S.W.2d 814 (1994). Walker, and its progeny appear to require that the criminal defendant guess correctly what jury instructions may later be given. Aside from not making much sense, this requirement is in direct conflict with Marshall, supra, and the cases that follow that decision, which require that the directed-verdict motion be brought before the jury is charged. These cases should be clarified. The Marshall line of cases appears to state the law correctly with respect to when the directed-verdict motion must be made, and the Walker line of cases does not.

The bottom line is that this court has refused to hear Grillot's appeal based on a technicality that has nothing to do with the administration of justice. The rule that a criminal defendant must move for a directed verdict on lesser-included offenses is not being used in refusing to hear Grillot's appeal because Grillot waived his right to the appeal, or because he

failed to bring all the issues before the trial court, but rather, today we hide behind a technicality to avoid doing our job, to avoid reaching the issue, and to avoid giving Grillot the appellate review that our rules, the case law, and common sense declare that he should receive.

Accomplice Liability

The basis of Grillot's criminal liability is unclear in the majority opinion. It appears that Grillot may be held liable for the murder of Will both on the basis of accomplice as well as direct criminal liability. Only accomplice liability was alleged. The majority states, "Here the act of murder was conceded, and the jury was required to decide whether Grillot acted purposely." It is not clear whether the "purpose" required here by the majority is "purpose" with respect to commission of the murder or "purpose" with respect to facilitating and promoting the murder under accomplice liability. First-degree murder requires purposeful intent, as does accomplice liability.

The jury was instructed that to sustain the charge of first-degree murder, "the State must prove . . . That with the purpose of causing the death of William Jackson, ERIC Z. Grillot . . . [as] an accomplice caused the death of William Jackson." In this case, for Grillot to be held liable for first-degree murder, the jury had to find that Phillips acted with the purpose of causing the death of William Jackson. There was never an issue of who killed Will. Phillips confessed to the murder, and Grillot's alleged liability for the murder was based on his status as an accomplice.

A person may commit an offense by his own conduct or by that of another person. Ark. Code Ann. § 5-2-401(Repl. 1997). If criminal liability arises from the conduct of another then liability is based on accomplice liability. Ark. Code Ann. § 5-2-404 — 403. There is no distinction between the criminal liability of the perpetrator and the accomplice. Riggins v. State, 317 Ark. 636, 882 S.W.2d 664 (1994). When two persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. Davis v. State, 350 Ark. 22, 86 S.W.3d 872 (2002). A participant cannot disclaim responsibility because he or she did not personally take part in every act that went to make up the crime as a whole. Davis, supra; Parker v. State, 265 Ark. 315, 578 S.W.2d 206 (1979). If Grillot is liable for the murder as an accomplice, he is liable for the murder committed by Phillips. The jury's decision on Phillips's intent in killing Will would determine what degree of murder Grillot would be held liable for as an accomplice.

Capital Murder Instruction

As the majority notes, Grillot argues that the model jury instruction erroneously states the law. However, as the majority also notes, Grillot was acquitted of capital murder. Therefore, a decision of this court with respect to the model jury instruction on capital murder would have no impact on Grillot. The issue is not one of prejudice. Rather, the acquittal on capital murder renders the issue moot. In Arkansas, an issue becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. Bohanan v. State, 336 Ark. 367, 985 S.W.2d 708 (1999). Because the issue is moot, it need not be addressed, and therefore, the discussion of harmless

error is unnecessary and confusing.

Jury Instructions on Lesser-Included Offenses

This case includes the issue of whether the trial court erred in instructing the jury on the lesser-included offense when Grillot argued that he had no involvement in the murder. This court has never answered the question of whether the trial court is obligated under Ark. Code Ann. § 5-1-110 (Repl. 1997), to instruct on lesser-included offenses when the defendant does not want the instruction. See State v. Jones, 321 Ark. 451, 903 S.W.2d 170 (1995). The dissent in State v. McCormack, 343 Ark. 285, 34 S.W.3d 735 (2000), also notes that the issue has never been addressed by this court. Although the issue has not been addressed in the past because it was raised by the State, and the appeal was declined under Ark. R.App.P. — Crim. 3, the issue is now raised by a criminal defendant and should be addressed by the court. The majority has discussed the issue as if this were an appeal by a criminal defendant who requested, but was denied a lesser-included instruction. That is not the case. Here, the issue involves an instruction requested by the State.

The majority cites Britt v. State, 344 Ark. 13, 38 S.W.3d 363 (2001), for the proposition that a lesser-included offense instruction is appropriate when it is supported by even the slightest evidence. Britt, supra, is not on point. The slightest evidence analysis in Britt refers to a request for an instruction by a criminal defendant. A criminal defendant is entitled to an instruction whenever the slightest evidence exists to support it. Whether the State is likewise entitled to an instruction when the slightest evidence supports it is a question that has not been answered by this court.

Doby, supra, also cited by the majority, involves a request by a criminal defendant for an instruction. In Doby, this court noted that Doby, in denying any involvement in the crimes, was taking an all or nothing approach in his case, and therefore, there was no rational basis for instructing the jury on a lesser-included offense. Similarly, in Roberts v. State, 281 Ark. 218, 663 S.W.2d 178 (1984), this court held that where the appellant denied any theft whatever, his request for an instruction on the lesser-included offense of theft by receiving was not rational, and the trial court committed no error in refusing to instruct the jury on the lesser-included offense. In Brown v. State, 321 Ark. 413, 903 S.W.2d 160 (1995), the case involved unlawful delivery of cocaine. In Brown, the appellant's proof established that she was elsewhere and innocent of participating in the cocaine transaction. The court held that it defies common sense to give the jury the lesser-included instruction on possession of cocaine that she requested. The court stated: "In other words, if Brown was not present when the drug sale occurred, she logically could not be present and participate in a lesser offense. Such a proffered instruction could do nothing but confuse a jury. Thus, we hold the trial court was correct in refusing it." Brown, 321 Ark. at 416. In another case where the charge and proof by the State were for the actual delivery of marijuana, there was no rational basis for instruction on the lesser-included offense of possession requested by the appellant. Whitener v. State, 311 Ark. 377, 843 S.W.2d 853 (1992).

Section 5-1-110 provides that the trial court is not obligated to instruct on a lesser-included offense unless there is a rational basis for concluding that the criminal defendant might be acquitted of the crime charged and convicted of the

lesser-included offense. The cases cited above arise from requests by criminal defendants for instructions on lesser-included offenses. This court must address the issue of whether the State is entitled to an instruction when there is a rational basis for doing so. The majority has not provided this analysis or answered the question posed by this issue. See Jones, supra; MacCormack, supra.

Based on the foregoing, I respectfully dissent.

THORNTON, J., joins.

CORBIN, J., not participating.

[fn1] The majority misses the point of this dissent in stating that I assert there is no distinction between capital murder and first-degree murder in this case. That only partially characterizes my dissent. The majority fails to recognize that the elements of accomplice liability are the same whether the charge is capital murder or first-degree murder, and therefore, the trial court in deciding the issue of accomplice liability as to one charge necessarily decided the issue as to the other. Thus, the court is requiring <Grillot to parrot magic words to no purpose, and putting form over substance.

APPENDIX B.

EXCERPTS FROM THE TRANSCRIPT & RECORD

PROCEEDINGS

THE COURT: This is CR 98-52. Mr. Blagg, have you received his affidavit?

MR. BLAGG: I have, Your Honor.

THE COURT: Are you satisfied that he is indigent?

MR. BLAGG: I'm satisfied that he is. I have the affidavit here for the Court to approve.

THE COURT: The public defender's office is appointed to represent Mr. Grillot. He is here this morning for what looks like a first appearance. Do you want to go ahead and do the arraignment?

MR. BLAGG: Let's go ahead and do the arraignment, Your Honor.

THE COURT: All right.

MR. BLAGG: We'll waive the reading of the information and enter a plea of not guilty to each count.

THE COURT: All right, there are three counts---

MR. BLAGG: Three counts.

THE COURT: Hindering apprehension, aggravated robbery and theft of property?

MR. BLAGG: That's correct.

THE COURT: Mr. Grillot, have you received a copy of the felony information and are you aware of the

IN THE CIRCUIT COURT OF VAN BUREN COUNTY,
ARKANSAS FIRST DIVISION

STATE OF ARKANSAS PLAINTIFF

VS CR 98-52

ERIC GRILLOT DEFENDANT

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PRE-TRIAL HEARING

* * * * * * * * *

Van Buren County Courthouse
Clinton, Arkansas
May 10, 1999

Before The HONORABLE DAVID L. REYNOLDS,
Circuit/Chancery Judge For The Twentieth Judicial District

APPEARANCES:

ON BEHALF OF THE STATE:

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Prosecuting Attorney
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801 Locust Street
Conway, Arkansas 72032

ON BEHALF OF THE DEFENDANT:

MR. RALPH BLAGG
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P.O. Box 246
Clinton, Arkansas 72031

Also Appearing: Mr. Stephen E. James, Deputy Prosecutor

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IN THE CIRCUIT COURT OF VAN BUREN COUNTY,
ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS PLAINTIFF

VS CR 98-52

ERIC GRILLOT DEFENDANT

* * * * * * * *

SUPPRESSION HEARING

* * * * * * * * *

Van Buren County Courthouse
Clinton, Arkansas May 24, 1999

Before The HONORABLE DAVID L. REYNOLDS,
Circuit/Chancery Judge For The Twentieth Judicial District

APPEARANCES:

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apartment over by, what I know as Fran's Restaurant. There was an apartment off--off of the restaurant. And he had relayed that information to me by the radio and I told him to wait till I got over there. Uh, Scott Bradley stayed at the father's residence and Ken Whillock and–I rode over there with Ken Whillock and we--when we got to the residence, I went to the front door and knocked on the door and I said, "Sheriff's office', you know. Uh, and there was quite a bit of time, you know, not a long time, a few seconds maybe forty-five seconds before, uh, a lady, I assume was Jeremy's mother, answered the door and ask what we wanted. And I said, "I need to talk to Eric." I could see Eric sitting on the couch. And I walked in the residence, uh, there was a lot of marijuana smoke in the air, as you went in the apartment. And, uh-

Q. Mike, I hate to interrupt you, but have you had training and experience in recognizing marijuana, marijuana smoke?

A. Yes. I'm--I've been around it quite a bit and know what it smells like. Uh-

Q. And was it just the smell or was it just the smell?

A. It was a strong odor and there was a lot of smoke in the apartment.

Q. Okay. Did you identify the nature of the smoke in the apartment?

A. No, we did not.

Q. What did it smell like?

A. It smelled like marijuana.
Q. Okay. And how thick was it?

A. It was pretty thick. I mean--

Q. Okay.

A. --uh, it was a cloud.

Q. Okay. And how big is the apartment?

A. Well, it was--it was a relatively small apartment. It looked like two rooms, two main rooms the best I can remember.

Q. Okay.

A. I wasn't't in there just a very short time.

Q. Okay.

A. I talked--

Q. Then what happened?

A. Uh, I talked to Mr. Grillot and, uh, I told him we needed him to come to the sheriff's office, we needed to talk to him. And, uh, about that time it, you know, he stood up off the couch and about that time Jim Thomas walked through the backdoor with Jeremy Phillips into the living room.

Q. Okay.

A..And I--I believe I asked him if he was Jeremy and he said, "yes." And I said, 'Well, you need to go to the sheriff's office with us." And, uh, we went outside and got in the car and Mr. Grillot got in the backseat of Ken's police car and we drove back to the

IN THE CIRCUIT COURT OF VAN BUREN COUNTY,
ARKANSAS FIRST DIVISION

STATE OF ARKANSAS PLAINTIFF

VS CR 98-52

ERIC GRILLOT DEFENDANT

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PRE-TRIAL HEARING

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Van Buren County Courthouse
Clinton, Arkansas
August 23, 1999

Before The HONORABLE DAVID L. REYNOLDS,
Circuit/Chancery Judge For The Twentieth Judicial District

APPEARANCES:

ON BEHALF OF THE STATE:

MR. STEPHEN E. JAMES
Deputy Prosecuting Attorney
20th Judicial District
P.O. Box 351
Clinton, Arkansas 72031

ON BEHALF OF THE DEFENDANT:

MR. RALPH BLAGG
Attorney at Law
P.O. Box 246
Clinton, Arkansas 72031

PROCEEDINGS

THE COURT: State of Arkansas vs Eric Grillot.

MR. BLAGG: Judge, I think the last time we were here Mr. Foster was going to report to me what statements that Mr. Phillips was going to make.

MR. FOSTER: That's correct, Your Honor. I was supposed to have done that before we actually got here today and I have been running around and for whatever reason I had not done it before we got here today and I apologize to the Court and I apologize to Mr. Blagg. If you want I can just go ahead and sort of give you a short form right now. Is that okay, Ralph?

MR. BLAGG: Well that's fine. I'm going to ask the Court to continue the case from the November setting but you can give it to me in all those forms. I need the complete statements.

MR. FOSTER: Absolutely, he'll need a complete statement and everything.

THE COURT: To the November court setting?

MR. BLAGG: That's what the Court had talked about it first and then you said something about well, let's see what the status is of this thing today.

MR. FOSTER: We are going to be filing another charge.

THE COURT: The problem with the November setting is the week of jury trials is the first week of modern

gun deer season.

MR. FOSTER: I think he said he wanted to continue it off of the November -- from November.

MR. BLAGG: From November forward.

THE COURT: February?

MR. BLAGG: They are going to be filing new charges, I know that.

MR. FOSTER: That's correct, based on what Mr. Phillips has said. And I will get that reduced to writing and get it to Mr. Blagg forthwith, Judge.

IN THE CIRCUIT COURT OF VAN BUREN COUNTY,
ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS PLAINTIFF

VS CR 98-52

ERIC GRILLOT DEFENDANT

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PRE-TRIAL HEARING

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Van Buren County Courthouse
Clinton, Arkansas
February 1, 2000

Before The HONORABLE DAVID L. REYNOLDS,
Circuit/Chancery Judge For The Twentieth Judicial District

APPEARANCES:

ON BEHALF OF THE STATE:

MR. STEPHEN E. JAMES
Deputy Prosecuting Attorney
20th Judicial District
P.O. Box 351
Clinton, Arkansas 72031

ON BEHALF OF THE DEFENDANT:

MR. RALPH BLAGG
Attorney at Law
P.O. Box 246
Clinton, Arkansas 72031

THE COURT: Eric Grillot.

MR. BLAGG: Judge, I guess we're ready on that one.

MR. JAMES: We've amended the charges.

MR. BLAGG: I don't have the amended charge. Have you amended the charge?

MR. JAMES: Is he here?

MR. BLAGG: He's not here right now. I talked to him this morning. You have an amended charge? Judge, they have filed an amended charge today. I think, based on that the defendant is going to have to move for a continuance.

THE COURT: Does it change the nature of the charges?

MR. BLAGG: Yes, it does. It changes it to capital murder, Judge. Changes it drastically. I think, Judge, under those situations when they change it to capital murder, I think time should be charged to the State instead of the defendant.

MR. JAMES: Well, Your Honor, we can't help it that somebody comes forward and tells us something different than they told us before and contrary to what Mr. Grillot said. That is what has happened.

MR. BLAGG: Judge, this case has been sitting for a long time.

MR. JAMES: And Mr. Blagg knows what's happening, we've been keeping him informed.

THE COURT: It will be moved to 2/17 and 3/6. This time, this short delay will be charged to the defense.

MR. BLAGG: Judge, we respectfully object to that.

THE COURT: Objection is noted.

(WHEREUPON, other matters unrelated were had

after which the following was had in this case.)

MR. BLAGG: Judge, you also set a pre-trial for Eric Grillot on 2/17. Given the fact that now there has been an information filed amending to capital murder, I will need more time to do that than just 2/17. I need to be here for that So could we do the hearing on March 6th?

THE COURT: That will be fine. We will decide

IN THE CIRCUIT COURT OF VAN BUREN COUNTY,
ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS PLAINTIFF

VS CR 98-52

ERIC GRILLOT DEFENDANT

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PRE-TRIAL HEARING

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Van Buren County Courthouse
Clinton, Arkansas
August 7, 2000

Before The HONORABLE DAVID L. REYNOLDS,
Circuit/Chancery Judge For The Twentieth Judicial District

APPEARANCES:

ON BEHALF OF THE STATE:

MR. H. G. FOSTER
Prosecuting Attorney
20th Judicial District
801 Locust Street
Conway, Arkansas 72032

ON BEHALF OF THE DEFENDANT:

MR. RALPH BLAGG
Attorney at Law
P.O. Box 246
Clinton, Arkansas 72031

THE COURT: All right, what are we doing today on Mr. Grillot's case?

MR. BLAGG: Judge, there's a couple --- there's a few things we need to take care of. One, is, excuse me, Your Honor, we had a suppression hearing on the statement. The Court never made a ruling on that, guess since the Court didn't't make it's ruling either the motion is granted or denied. We had a hearing, but the Court never made a ruling on that.

THE COURT: Was there a brief to be filed?

MR. BLAGG: Judge, there was a brief to be filed, but after looking at the case law, I would think the case that I had cited to the Court is dispositive of the issue. So, we just stand on the testimony introduced at that --- at that hearing.

THE COURT: All right.

MR. BLAGG: And ask the Court to make a ruling on motion to suppress the statement.

THE COURT: Your motion to suppress will be denied.

IN THE CIRCUIT COURT OF VAN BUREN COUNTY,
ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS PLAINTIFF

VS CR 98-52

ERIC GRILLOT DEFENDANT

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TRIAL

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Van Buren County Courthouse
Clinton, Arkansas
August 23 - 25, 2000

Before The HONORABLE DAVID L. REYNOLDS,
Circuit/Chancery Judge For The Twentieth Judicial District

APPEARANCES:

ON BEHALF OF THE STATE:

MR. H. G. FOSTER
Prosecuting Attorney
20th Judicial District
801 Locust Street
Conway, Arkansas 72032

ON BEHALF OF THE DEFENDANT:

MR. RALPH BLAGG
Attorney at Law
P.O. Box 246
Clinton, Arkansas 72031

MR. FOSTER: Judge, excuse me. Actually, I'm going to --- I'm going to ask you to change it back because the jury instruction does say any person. I'll show you. Premeditated or other purpose caused the death of any person. I ask that we go with the straight AMCI on that.

THE COURT: Okay.

MR. BLAGG: Going back to "any"?

THE COURT: Going back to "any".

MR. BLAGG: Okay. Judge, I want the record to be clear that as far as that clause, that would be premediated and deliberating purpose of cause of death – that is an erroneous statement of the law.

THE COURT: Okay.

MR. BLAGG: Okay. The next issue, if course, is going to be the lesser includeds.

THE COURT: All right.

MR. BLAGG: Judge, we do not want a lesser included. I have a case here Nichols versus State, 62 Ark. 212, 2000. Judge, in this case we are denying any accomplice liability. We're denying that we committed any murder We're charged with capital murder, and for -- for it to have a lesser included is not consistent with our defense, which is we did didn't commit any murder. We are not an accomplice. We did not commit any murder.

MR. FOSTER: Are you pausing, or are you done?

MR. BLAGG: I'm done.

MR. FOSTER: Okay. Judge, in this case, the lesser includeds were requested by the Defense, and the Defense had offered denial as their defense. So that -- in that case, you got a situation where the Defendant was coming in and saying, "No, nothing happened, and we want lesser includeds." Therefore, the lesser includeds were denied, and it was proper, and that's not the case we have here.

MR. BLAGG: Judge, the case is here. We have denied it on opening statement. We denied we committed the offense of capital murder. We denied that we committed aggravated murder.

MR. FOSTER: Oh, admittedly, you -- you are.

MR. BLAGG: We denied those.

MR. FOSTER: The difference is, Ralph, that in that case, the Defendant was pleading inconsistent theories, and the Court did not allow them to do it. This is a different situation. You say no murder took place. We say murder took place. Therefore, we're entitled to the lesser includeds.

MR. BLAGG: No. We say -- we don't say the murder didn't take place.

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THE COURT: Your objection is noted. They'll be given

MR. BLAGG: The lessers are being given?

THE COURT: Yes. Now, we're to aggravated robbery

APPENDIX C.

EXCERPTS FROM THE PETITIONER'S STATEMENT

he tried to assault an officer?

ERIC: Yeah.

VICKIE BLAYLOCK: So is he going to let you carry the brunt of it?

ERIC: He was high.

VICKIE BLAYLOCK: (inaudible) Are you high right now or you straight?

ERIC: Sober as hell.

ROSS DEAN: You haven't smoked or drank anything today?

ERIC: Yes, I have today right before I come in here.

ROSS DEAN: What time? But you are not high now?

ERIC: No man, no, I wasn't high thirty or forty-five minutes ago.

SGT. BEACH: Well, let's just do it this way, do you feel like you are impaired?

ERIC: No, no.

SGT. BEACH: You understand what we are doing?
ERIC: I understand what I'm doing, yeah.

SGT. BEACH: Anybody been mean to you?

ERIC: Huh?

SGT. BEACH: Anybody in here been mean to you?

ERIC: No.

SGT. BEACH: Are you doing now what you want to

you all the way through this.

ERIC: I ain't betraying a friend like that.

VICKIE BLAYLOCK: Honey, you're going to have to. It's going to come out.

ROSS DEAN: It's gone too far, Eric. It's time for the truth.

VICKIE BLAYLOCK: You want us to stop the tape and start all over?

ERIC: Yeah.

(WHEREUPON, the tape was stopped and a new tape

was started and the interview continued.)

VICKIE BLAYLOCK: It might be easier for you to sit and tell us first and then call mom in afterwards. You don't know how hysterical she might get. That's is up to you.

ROSS DEAN: Eric, this is, you know, I'm an old guy, I've done this for almost twenty-five years. know that things can happen all of a sudden. A guy can make some terrible judgements in a heart beats worth of time that you will have to carry with you for the rest of your life. But I know that you don't have to carry it by yourself. And regardless of what you think right now, you are not going to feel any better about any of this until you turn it loose; until you tell somebody the utter and absolute truth

stay here and take the truck?

ERIC: I just kept asking why, why?

ROSS DEAN: What did he say?

ERIC: He said he got paid for it.

ROSS DEAN: Got paid for it?

ERIC: Yeah. Said somebody wanted him dead.

ROSS DEAN: Did he say who or why,?

ERIC: I don't know. Somebody wanted Will dead and he was gettin' paid for it.

ROSS DEAN: Do you believe him?

ERIC: I don't know, I don't believe him. I think he's, I don't know. I---

ROSS DEAN: I'm just asking your opinion as far as why do you think he did it?

ERIC: He's not here listening to every fuckin' word I say, is he?

ROSS DEAN: No sir.

ERIC: Is this going to be played in court?

ROSS DEAN: No, the tape won't. They might ask you to testify. But we're just talking right now. And honestly, you know, I didn't know either one of you before today. And you know him a lot better than we do. We're just trying to get some --- we're trying to figure out why, Eric, that's all.

ERIC: I really don't, I mean, he said he was

APPENDIX D.

EXCERPT FROM THE STATEMENT OF JEREMY PHILLIPS

Interview of Jeremy Phillips
by **ASP mv. Ross Dean**

Ross Dean: Okay, you might have to speak up Jeremy. This is Corporal Ross Dean with the Arkansas State Police. It is April 4 year 2000. The time is *1:45* p.m. and we're in the conference room at the Vamer Unit. I m with Jeremy Phillips, social security number, 432- 41-9669. Is that correct?

Jeremy Phillips Yeah.

Dean: Okay and this interview is in regard to the death of William Jackson and Jeremy if you would, I d like for you to just go ahead and tell me the involvement that Eric Grillot had with the death of William. Now speak up. I'm tape recording this interview so there'll be a transcript.

Phillips: Alright. I was paid to kill Will - $8,000.00 by someone down in Gulf Shores, Alabama.

Dean: Who paid you?

Phillips: Well, I can't give that source out right now. But uh, anyway, Eric had known all the time we — I planned it but Eric was involved.

Dean: How was Eric involved?

Phillips: Eric's job was to drive his truck, Will Jackson's truck, back down to Gulf Shores, Alabama, get rid of his

wallet, keys, and act as though Will had taken off to Florida to sell magazines for a certain company of some kind that Will had been talking about before. But Eric was to tell his mother and dad, friends, people that knew Will that he had just taken off and act as though everything was all right.

Dean: You say that Eric knew that you was paid to kill Will?

Phillips: Right.

Dean: Did he know the amount?

Phillips: Yeah.

Dean: And that was?

Phillips: $8,000. I was going to pay him $2,000.00

Dean: You were going to pay Eric $2,000.00?